

JOHNNIE DOWNS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for the employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order (94-LHC-2274) of Administrative Law Judge Lee J. Romero, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant's claim for benefits under the Act was transferred to the Office of Administrative Law Judges for consideration of employer's motion for summary decision seeking to have claimant's claim barred by Section 33(g) of the Act, 33 U.S.C. §933(g). Prior to the hearing on this matter, claimant filed a motion to withdraw his claim pursuant to 20 C.F.R. §702.225(a) averring, *inter alia*, that he filed a claim for benefits against employer for pulmonary disease related to his employment, that he filed third-party actions against manufacturers and distributors of asbestos products, and that he has no present disability and is not seeking medical benefits under the Act. Employer opposed the motion for withdrawal alleging that it is improper in light of its motion for summary decision. The Director, Office of Workers' Compensation Programs, supported claimant's motion, citing *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12 (CRT) (5th Cir. 1994). The administrative law judge found that "claimant has complied with the regulatory criteria provided in 20 C.F.R. §702.225(a) to permit withdrawal of his claim without prejudice," citing the

Board's decision in *Boone v. Ingalls Shipbuilding, Inc.*, 28 BRBS 119 (1994) (Decision and Order on Recon. *en banc*)(Brown, J., concurring). Decision and Order at 2. He then remanded the case to the district director "for further appropriate action consistent with this order to permit claimant to withdraw his claim pursuant to 20 C.F.R. §702.225(a)." *Id.* at 3. Employer appeals the administrative law judge's order.

We hold that the administrative law judge effectively ruled on claimant's motion to withdraw, and we affirm the administrative law judge's granting of claimant's motion as it accords with law and constitutes a rational exercise of his discretion. In its recent decision in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Boone]*, 81 F.3d 561 (5th Cir. 1996), *vacating and remanding* 28 BRBS 119 (1994) (Decision and Order on Recon. *en banc*)(Brown, J., concurring), the United States Court of Appeals for the Fifth Circuit addressed the district director's authority to approve claimant Boone's motion to withdraw his claim following the district court's January 7, 1993, issuance of a writ of mandamus ordering the district director to transfer a group of claims to the Office of Administrative Law Judges for hearings.¹ On February 27, 1995, the district court issued a second order explaining the earlier order and concluding that while the mandamus order permitted claimants to move to withdraw claims, the Office of Administrative Law Judges, rather than the district director, was authorized to hear such motions. Based on this order, which was not appealed, the court held in *Boone* that the district director erred in considering claimants' motions to withdraw their claims. The court further found that employer was aggrieved by the district director's action because it lost the procedural right to have the motions to withdraw considered in an adjudicative forum. The court therefore vacated the district director's order allowing Boone to withdraw his claim without prejudice and remanded the case for further proceedings.

The instant case, however, was properly transferred to the Office of Administrative Law Judges, and claimant's motion to withdraw was considered by the administrative law judge as intended by the district court. Employer's procedural rights to a decision in an adjudicative forum, which formed the basis for the court's finding that employer was aggrieved in *Boone*, was fully protected by the consideration of claimant's motion in the proper forum. *Boone*, 81 F.3d at 566-567.

Moreover, the administrative law judge fully considered claimant's motion for withdrawal and employer's objection thereto under the regulatory criteria, finding claimant satisfied the criteria for withdrawal. In view of these facts, we conclude that the administrative law judge effectively granted claimant's motion to withdraw, notwithstanding the remand of the case to the district director which we view as for purely ministerial action. *See* 20 C.F.R. §702.349.

The regulation at Section 702.225(a) provides that a claimant may withdraw his claim prior to the adjudication thereof if:

- (1) He files with the district director with whom the claim was filed a written request stating the reasons for withdrawal;

¹By Order dated August 10, 1995, the Board granted employer's motion to hold the captioned case in abeyance pending a decision in *Boone*. In view of the issuance of the Fifth Circuit's decision, the abeyance is hereby lifted.

- (2) The claimant is alive at the time his request for withdrawal is filed;
- (3) The district director approves the request for withdrawal as being for a proper purpose and in the claimant's best interest; and
- (4) The request for withdrawal is filed on or before the date the OWCP makes a determination on the claim.

20 C.F.R. §702.225(a). After considering the declarations in claimant's motion and noting that the merits of the claim had not been adjudicated, the administrative law judge found that claimant complied with the regulatory criteria to permit withdrawal without prejudice.² See generally *Henson v. Arcwel Corp.*, 27 BRBS 212 (1993); *Langley v. Kellers' Peoria Harbor Fleeting*, 27 BRBS 140 (1993) (Brown, J., concurring and dissenting). The administrative law judge found that employer's objection to claimant's motion to withdraw is unfounded based on the Board's reasoning in *Boone*, 28 BRBS at 119. Although the Fifth Circuit vacated the Board's decision on the ground that employer was aggrieved by having the district director, rather than the administrative law judge, rule on claimant's motion to withdraw, *Boone*, 81 F.3d at 566-567, it did not address the Board's broader holding that withdrawal, in general, did not aggrieve employer. The Board's holding on this issue is based on the fact that unless claimant files a new claim for compensation or medical benefits, employer cannot be held liable for benefits and therefore has suffered no present harm by virtue of the claim's withdrawal. *Boone*, 28 BRBS at 123.³ The administrative law judge's finding in the instant case thus is affirmed as within the scope of the district court's mandamus order and the administrative law judge's discretion. *Boone*, 81 F.3d at 566; *Asbestos Health Claimants*, 17 F.3d at 135-136 n.14, 28 BRBS at 17 n.14 (CRT) (noting that withdrawal "would be an unsurprising choice, particularly for those who suffer no current disability and thus only made protective filings").

Accordingly, the administrative law judge's order granting claimant's motion to withdraw his claim is affirmed.

SO ORDERED.

²Section 702.225(c) describes the effect of a withdrawal as follows:

Where a request for withdrawal of a claim is filed and such request for withdrawal is approved, such withdrawal shall be without prejudice to the filing of another claim, subject to the time limitation provisions of section 13 of the Act and of the regulations in this part.

20 C.F.R. §702.225(c).

³The Board expressed no opinion as to whether Section 33(g) would bar claimant Boone from recovering benefits if he filed a new claim. *Boone*, 28 BRBS at 124 n.3.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge